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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 262

UNITED STATES OF AMERICA, PETITIONER

v.

GARBUTT OIL COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on April 28, 1937.

OPINION BELOW

The memorandum of conclusions handed down by the District Court (R. 51–52) is unreported. The opinion of the Circuit Court of Appeals (R. 85) is reported at 89 F. (2d) 749.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1937 (R. 89). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After filing a timely claim for refund on certain specific grounds, the respondent, after the statutory period of limitation had expired, filed, as a purported amendment, another claim for refund on an entirely different and new ground. Was the respondent entitled to recover on the new ground?

STATUTE AND REGULATION INVOLVED

The statute and regulation involved herein will be found in the Appendix, *infra,* pp. 14–16.

STATEMENT

This is an action to recover an alleged overpayment of income taxes for the year 1919, tried to the court without a jury, jury trial having been waived (R. 46). The facts, as stipulated (R. 47–50) and as found by the trial court (R. 53–67), may be summarized as follows:

The respondent, a California corporation, on October 3, 1907, leased certain oil land and, after the discovery of oil, was engaged in the production and distribution of oil therefrom. On April 10, 1911, its board of directors adopted a resolution to the effect that all oil produced after January 1, 1911, should be assigned to the respondent's lessors to the extent of their royalty interest, and to the respondent's stockholders to the extent of their holdings of stock, pro rata, in kind, so long as the stockholders should pay calls for money necessary

to cover the expenses of respondent. Thereafter, all oil produced was distributed to the lessors and the stockholders, in accordance with their respective interests. On its books and income tax returns the plaintiff corporation adopted a system of recording the oil produced at its market value and treated the difference between that value and the cost of producing the oil as income. The Commissioner of Internal Revenue likewise adopted this method and treated the income so computed as taxable income. (R. 49, 66–67.)

For the year 1919, respondent filed an income and excess profits tax return disclosing a net income of $16,928.61, and a tax liability of $2,072.68, which was paid during 1920. Upon audit thereof, the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 for the year 1919, which additional tax was paid by respondent on April 3, 1925. (R. 53–55.)

On March 30, 1929, respondent filed a claim for refund of income and excess profits taxes alleged to have been overpaid for the year 1919, in the amount of $3,105.65, based upon two specific grounds: (1) that it was entitled to an additional deduction for the amortization of the cost of a certain drilling contract, and (2) that, for the purposes of profits tax, its invested capital had been understated by reason of the failure to include the unrecovered value of the drilling contract (R. 54–62).

While this claim was pending before the Commissioner, the respondent, on May 31, 1929, filed a document entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919", wherein it asserted as "a further reason" in support of its claim that, because of the distribution of its oil, in kind, it had realized no taxable income during the year 1919, and whereby it sought the refund of $5,178.33. (R. 62-65.)

Thereafter, the Commissioner, in his letter of August 12, 1929 (R. 37–38), notified the respondent that its claim for refund of $3,105.65 would be rejected, giving his reasons for the rejection of the grounds urged in the respondent's original claim; and also, to the extent recited in that letter, the Commissioner undertook to consider on its merits the supplemental statement filed on May 31, 1929, saying with respect to the new ground for refund urged in the supplemental statement: "This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation." (R. 66.)

On November 13, 1929, the Commissioner sent another letter to the respondent (R. 39–41), notifying it that the claim for refund would be rejected, and stating that its second claim was rejected on

the ground that it was an entirely new claim filed after the expiration of the period of limitation for the filing of claims. Formal rejection followed on November 21, 1929 (R. 48–49).

The respondent sued in the District Court for the recovery of $3,105.65, upon both the grounds stated in its original claim of March 30, 1929, and those asserted in its second claim of May 31, 1929 (R. 7–42). At the trial, the first claim was abandoned and recovery was sought upon the grounds set forth in the second claim (R. 65, 88). The District Court held that the statement of May 31, 1929, did not constitute an amendment of the claim filed March 30, 1929, and that the respondent was barred from recovery because the claim relied upon (the statement of May 31, 1929) had been asserted for the first time after the expiration of the period of limitation provided by Section 284 (b) of the Revenue Act of 1926 for the filing of claims for refund. (R. 51–52, 67–68.) Judgment was entered in favor of the United States (R. 69–70).

The Circuit Court of Appeals, reversing the District Court, stated that the trial court had erred in holding that the statement of May 31st was not an amendment to the claim filed on March 30th, and held that the amendment filed was germane to the original claim.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts of this case, the respondent was entitled to recover on the new

claim, filed after the period of limitation had expired, but purporting to be an amendment to the timely claim for refund.

2. In failing to hold that, under the facts of this case, refund on the new claim, filed after expiration of the period of limitation, was barred by the statute of limitations, and that the claim so filed did not constitute an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In holding that the purported amendment was germane to the original claim for refund.

4. In failing to affirm the judgment rendered by the District Court in favor of the United States.

REASONS FOR GRANTING THE WRIT

1. In holding that a claim for refund seeking the repayment of taxes in a stated amount on specific grounds may be amended, after the statute had run on the filing of a new claim, to permit recovery on a ground entirely unrelated to those asserted in the original claim, the court below has rendered a decision which conflicts with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Richards,* 79 F. (2d) 797, certiorari denied, 297 U. S. 718, and *Bryant Paper Co.* v. *Holden,* 63 F. (2d) 370, certiorari denied, 290 U. S. 631, and the holding of the Second Circuit in *New York Trust Co.* v. *United*

States, 87 F. (2d) 889, certiorari denied, June 1, 1937.[1] The decision below also conflicts in principle with the decision of this Court in *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73.

The view of the court below that the question presented in the instant case was answered by this Court in *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 64, constitutes a misconstruction and a misapplication of that case. The original claim in that case was indefinite and general, and failed to state any grounds upon which the refund was demanded. Here the original claim set forth definite, specific grounds supported by particulars.

2. The consideration of a similar question has been requested by the Government's petition for certiorari in the case of *Andrews* v. *United States,* 17 F. Supp. 980 (C. Cls.), October Term, 1937, No. 48. In that case, as in the instant case, two claims for refund were filed, one before and one after the

[1] On June 22, 1937, a petition for rehearing was filed by the taxpayer in *New York Trust Co.* v. *United States,* No. 921, October Term, 1936. That case was decided by the Circuit Court of Appeals on alternative grounds. The first ground presents a question of amendment of specific claims for refund, and the second ground the question whether the original claim had been finally acted upon prior to the filing of the alleged amendment. In its brief in opposition in that case, while the Government asserted that the judgment of the Circuit Court should, in any event, ultimately be sustained on the second ground, the Government did not, in view of the importance of the first question and the probable conflict of decisions, oppose a review of the first question in that case if deemed essential to the decision therein.

bar of the statute of limitations, and the second claim, while purporting to amend the still pending first claim, introduced a new ground. The first claim sought the allowance of deductions from gross income upon the ground that stocks held by the taxpayer in two corporations had become worthless. The second claim, which was for a larger amount, introduced the new ground that an item of gross income resulting from a transaction with a third corporation should have been treated as a gain on the sale of stock and not as a dividend. The first claim was disposed of to the satisfaction of the taxpayer, and the second claim was disallowed on the ground that it was barred by the statute of limitations. The Court of Claims allowed a recovery on the second claim. The Government's petition for certiorari in that case states that the holding of the Court of Claims, that a claim for refund on specific grounds may be amended after the expiration of the period of limitation to permit recovery upon an entirely different and unrelated ground, is in conflict with the same cases with which the decision below in the instant case is asserted to be in conflict.

3. The question presented by the instant case is one of importance in the administration of the Federal revenue laws and is of interest to taxpayers generally. This reason is also urged in the petition for certiorari in *United States* v. *Andrews, supra.* Since March 27, 1929, the regulations of

the Treasury Department, applicable to claims for refund filed on or after May 1, 1929 (the original claim in the present case was filed March 30, 1929, and the second claim May 31, 1929), have consistently provided that claims for refund must set forth in detail and under oath each ground upon which a refund is claimed and that no refund will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor, except upon one or more of the grounds set forth in a claim, or an amendment thereof, *filed prior* to the expiration of such period.[2] The decisions of this Court which have dealt with the question of amendment of claims for refund, such as *United States* v. *Memphis Cotton Oil Co., supra,* involved claims filed under earlier and different regulations.[3] Taxpayers, although precluded under present regulations, are continuing to litigate their right to amendment of a timely claim after the expiration of the statutory period

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[2] Treasury Decision 4265, VIII–1 Cumulative Bulletin 110 (Appendix, *infra*, p. 16). Beginning with the regulations under the Revenue Act of 1932, the words "or an amendment thereof" have been eliminated, but the deletion has resulted in no change because even under the language of Treasury Decision 4265 the amendment must have been filed prior to the expiration of the period of limitation. Article 1254, Regulations 77, Revenue Act of 1932; Articles 322–3, Regulations 86, Revenue Act of 1934; Articles 322–3, Regulations 94, Revenue Act of 1936.

[3] Mim. 4092 of October 30, 1933, Cumulative Bulletin XII–2, pages 96, 97.

of limitation, and, as the question arises frequently, we feel that this Court should settle whatever doubts may exist as to the validity of the existing regulations. However, even under this Court's decisions, and without regard to the change in the regulations, we believe, as urged in the *Andrews* petition, that there was no right of amendment.

4. The original claim for refund in the present case, filed March 30, 1929, claimed an overpayment of taxes for the year 1919 in the amount of $3,105.65, and specified as the grounds for the refund that the respondent was entitled to an additional deduction for amortization of the cost of a certain drilling contract, and that the respondent was entitled to an addition to invested capital, for the purposes of profits tax, for the unamortized cost of the drilling contract. The tax sought to be refunded had been paid April 3, 1925, and the period for filing a claim for refund thereof expired on April 3, 1929. Section 284 (b) of the Revenue Act of 1926, *infra*. The purported amendment to the original claim was filed May 31, 1929, which was subsequent to both April 3, 1929, and May 1, 1929, the latter being the effective date of the new regulations (Treasury Decision 4265, *infra*). This second claim, allegedly "for the Purpose of Perfecting and Completing" the original claim, asked for a refund of $5,178.33, upon the ground that the respondent realized no taxable income from the distribution of oil, in kind, to its stockholders.

The original claim did not charge overpayment generally, but asked for a refund of a stated sum and specified particular facts and reasons why that sum of money should be refunded. The case, therefore, is not one where the claimant has left the grounds of challenge open, and where the Bureau of Internal Revenue has itself to blame for not insisting at the outset upon a full disclosure of the grievance. The grievance was specifically stated, and the Commissioner was called upon to explore the narrow and designated territory of whether the respondent was entitled to a deduction for the amortization of the cost of the drilling contract, and of whether it was entitled to add to its invested capital the unrecovered value of that drilling contract. In its income tax returns, and in its original claim for refund, the respondent had treated the difference between the production cost and market value of its oil as taxable income. (R. 22–32, 49.) In this treatment the Commissioner had acquiesced (R. 49).

The second claim for refund, filed May 31, 1929, asserted, for the first time, the new ground that the respondent derived no taxable income in 1919 because of the distribution of its oil, in kind, to its stockholders. It being then too late to file a new claim for refund, the respondent sought to assert the new claim by way of amendment to the old claim, or, as the respondent labeled it, "for the Purpose of Perfecting and Completing" the origi-

nal claim. The new claim, which was for a larger amount, set up an entirely different and unrelated ground for the recovery of taxes. While the old claim dealt exclusively with the facts surrounding the drilling contract, seeking a deduction and an addition to invested capital by reason thereof, the new claim presented the contention that the respondent realized no taxable income at all during the taxable year. It is apparent that the paths of investigation to be followed in considering the original claim would at no time cross the paths to be followed under the new claim. The consideration of a claim for a deduction and for an addition to invested capital on account of a drilling contract would not lead to a consideration of what was income to the respondent. The new claim sought relief on a wholly different grievance, on an entirely unrelated theory and on unrelated facts.

If, as this Court and lower Federal courts have held, in determining what is a permissible amendment of a claim for refund, weight must be given to analogies of pleading in a lawsuit, the conclusion must follow in the present case that the claim of May 31, 1929, did not constitute merely a perfection of a defectively stated cause of action, or the adaptation of a prayer for relief to facts adequately alleged, but was the introduction of an entirely new cause of action. Cf. *United States* v. *Seminole Nation,* 299 U. S. 417; *B. & O. S. W. R. Co.* v. *Carroll,* 280 U. S. 491.

5. An added factor is present in the instant case, in addition to the facts which are common to this case and to *Andrews* v. *United States, supra.* In the instant case, the Commissioner did, in his letter of August 12, 1929, purport to consider the second claim on its merits, to the extent of stating that his office held to the contrary. But there was at no time a consideration calling for a reaudit of the entire case. Cf. *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153 (C. Cls.), certiorari denied, April 26, 1937; and *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290 (C. Cls.), certiorari denied, 293 U. S. 599. However, the court below, in arriving at its conclusion, did not rely upon the fact that the Commissioner purported to consider the second claim on its merits, to the extent recited in his first letter of rejection, dated August 12, 1929. The decision of the court below rests solely upon the holding that the purported amendment was germane to the original claim for refund, and allowable as such.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

STANLEY REED,
Solicitor General.

JULY 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively,

immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Title 26, Sec. 1672.)

Treasury Decision 4265, VIII–1 Cumulative Bulletin 110 (amending Art. 1254 of Regulations 74, promulgated under the Revenue Act of 1928):

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

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